OPINION OF ADVOCATE GENERAL ELMER

delivered on 8 February 1996 *

Introduction

1. In this case the Commission seeks a declaration that, by virtue of the fact that the Wasser-und Schiffahrtsamt (Waterways and Navigation Office) Emden awarded a public works contract for the dredging of part of the lower Ems from Papenburg to Oldersum by negotiated procedure without publishing a tender notice in the *Official Journal of the European Communities*, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, [1] as amended by Council Directive 89/440/EEC of 18 July 1989, [2] (hereinafter 'the directive').

2. Although the Federal Republic of Germany does not deny that the project in question is covered by the directive, it submits that the action brought against it should be dismissed on the ground that the conditions contained in Article 5(3)(c) of the directive, cited below, were satisfied and that it was for that reason possible to award the works contract by negotiated procedure without prior publication of a tender notice.

The relevant provisions of Community law

3. Article 5(1) of the directive provides that, in awarding public works contracts, the contracting authorities must apply 'open procedures', 'restricted procedures' or 'negotiated procedures'.

Under Article 5(2), the contracting authorities may, in a number of specified cases, award public works contracts by negotiated procedure with prior publication of a tender notice and after having selected the candidates according to qualitative public criteria.

Article 5(3) provides that the contracting authorities may in certain cases award public

* Original language: Danish.

1 — OJ, English Special Edition 1971 (II), p. 682; original reference: JO 1971 L 185, p. 5.

2 — OJ 1989 L 210, p. 1.

works contracts by negotiated procedure without prior publication of a tender notice. Under Article 5(3)(c), this may, *inter alia*, happen:

'in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 above cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable [to] the contracting authorities'.

Article 5(4) states that 'in all other cases, the contracting authorities shall award their public works contracts by the open procedure or by the restricted procedure.'

4. Under Article 12(1) of the directive, in conjunction with Article 12(8) thereof, contracting authorities must, by means of an indicative notice in the *Official Journal of the European Communities*, make known the essential characteristics of the works contracts which they intend to award and which exceed a determined threshold value. Under Article 12(2), in conjunction with Article 12(9), contracting authorities which wish to award a public works contract by open or restricted procedure, or by negotiated procedure as referred to in Article 5(2), are required to make known their intention by means of a notice in the *Official Journal of the European Communities*.

Article 14 lays down rules on the time-limits which, in restricted procedures and negotiated procedures as described in Article 5(2), the contracting authorities may fix for receipt of requests to participate. The period set may not in general be less than 37 days from the date of dispatch of the notice of the project to the Office for Official Publications of the European Communities. Article 15(1), however, provides that in cases where urgency renders impracticable the time-limits laid down in Article 14, a period of not less than 15 days must be fixed.

In the case of restricted procedures, Article 14(3) requires the time-limit fixed by the contracting authorities for receipt of tenders to be not less than 40 days from the date of dispatch of the written invitation, although this may, under Article 14(4), be reduced to 26 days if the tender notice provided for in Article 12(1) has been published. In the cases of urgency referred to in Article 15(1), the time-limit may be further reduced to ten days from the date of invitation to tender.

The facts of the case

5. In September 1989, a decision was taken, following a request from the town of Papenburg, to attempt to deepen the lower Ems so as to make it navigable for Panama class vessels with a 6.80 metre draught. Within the context of general transport development, this deepening was regarded as being of general economic significance for the region inasmuch as it would benefit the economic structures of a region which was already structurally weak.

6. It transpired in 1990 that the region's largest employer, the Meyer-Werft shipyard, had concluded a contract for the delivery of a vessel with a 6.80 metre draught, the *Zenith*, for a price of approximately DM 500 million. This vessel could be delivered only if part of the lower Ems was deepened. The delivery of the vessel was scheduled for 18 February 1992, at the expected period of spring tide. If this delivery date was not complied with, the shipyard was required to pay a *per diem* contractual penalty of USD 80 000.

7. The Wasser-und Schiffahrtsamt Emden comes under the waterways navigation administration of the Federal Republic of Germany and was responsible for the implementation of the project to deepen the lower Ems. The plans for the project, however, first required approval. The authority responsible for the approval procedure was the Wasser-und Schiffahrtsdirektion (Central Office for Waterways and Navigation) Aurich.

8. After a number of necessary preliminary examinations, the Wasser-und Schiffahrtsdirektion Aurich initiated the approval procedure on 5 November 1990 in order that the project could, if appropriate, obtain approval at the end of May 1991. A discussion of the project took place on 11 April 1991. The Bezirksregierung für Weser-Ems (Weser-Ems Regional Authority), whose agreement was necessary before the plans could be approved, did not on this occasion express any objections to the project.

9. The Wasser-und Schiffahrtsamt Emden intended to put the whole of the works contract for the deepening of the lower Ems out to public tender and accordingly published a short description of the planned works in a supplement to the *Official Journal of the European Communities* of 20 April 1991.

10. At the end of May 1991, the Bezirksregierung für Weser-Ems refused on ecological grounds to give its final approval for the planned deepening. The project for a permanent deepening of the lower Ems was therefore postponed for the time being. However, the approval procedure for a project to

deepen temporarily part of the lower Ems with a view to making it possible to deliver the vessel built by the Meyer-Werft shipyard was continued.

11. In reply to a request from a non-German company for more detailed information concerning the works announced on 20 April 1991, the Wasser-und Schiffahrtsamt Emden informed that company on 30 May 1991 that it could receive documentation on the project only after the tender notice had been published in the *Official Journal of the European Communities*. On 19 June 1991, the Wasser-und Schiffahrtsamt Emden further informed the company in question that the planned public tender could not be carried out because of pressure of time.

12. On 21 June 1991, a procedure was instead initiated for the award of a contract for the temporary deepening of part of the lower Ems by negotiated procedure without prior publication of a tender notice. Six German undertakings were requested to submit tenders for that purpose. A decision was taken on 3 July 1991 to approve the plans for the temporary deepening of part of the lower Ems. This decision became effective on 15 August 1991, and on that date the contract for the project concerning the temporary deepening of part of the lower Ems was awarded to one of the undertakings which had been requested to tender.

13. On the previous day, 14 August 1991, the Commission had sent to the German Government a telex message pointing out that, in the Commission's opinion, the conditions governing the award of a contract by negotiated procedure without prior publication of a tender notice had not been satisfied. By letter of 2 September 1991, the German Government replied to the Commission that the conditions in Article 5(3)(c) of the directive governing the award of a contract by negotiated procedure without prior publication of a tender notice had, in its view, been satisfied.

14. The Commission did not agree that the project was covered by Article 5(3)(c) and, by a letter of formal notice of 12 November 1991, it instituted infringement proceedings under Article 169 of the Treaty. In its reply of 6 March 1992 to that letter of formal notice, the German Government referred once again to Article 5(3)(c) of the directive. The Commission restated its views in a reasoned opinion of 27 April 1993. The German Government replied to that opinion by letter of 28 September 1993 and pointed out that the method of procedure applied had been necessary so as to ensure completion of the project before 18 February 1992, the date on which the vessel built at the Meyer-Werft shipyard was to be handed over.

Pleas in law of the parties and my own opinion

15. As will be clear from the introduction, the question whether the German Government should be held guilty in this case of breaching its obligations under Community law depends on whether the conditions set out in Article 5(3)(c) of the directive have been satisfied. If they have been satisfied, the Federal Republic of Germany will have been entitled to award the contract for the performance of the works in question by negotiated procedure without prior publication of a tender notice. If, on the other hand, those conditions have not been satisfied, the Federal Republic of Germany will not have been entitled to award the contract in the manner in which it did and must be held guilty in accordance with the form of order sought by the Commission.

16. In what follows regarding each individual aspect of Article 5(3)(c) of the directive, I shall therefore examine the views of the parties and set out my own opinion thereon.

First, however, I must point out that the negotiated procedure under Article 5(2) and (3) of the directive must, according to the 16th recital in the preamble, be 'considered to be exceptional and therefore only applicable in certain limited cases'. The provision which now features in Article 5(3)(c) also formerly featured, with almost identical wording, in Article 9(d) of Directive 71/305. The Court's case-law dealing with the interpretation of the former Article 9(d) may therefore be applied to the present Article 5(3)(c).

With regard to the former Article 9, the Court has generally held [3] that:

'the provisions of Article 9 of Directive 71/305, which authorize derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public works contracts, must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.'

The Court further held in a judgment of 2 August 1993 [4] that:

'According to Article 9(d) of the directive, the derogation for which it provides, namely

3 — See most recently Case C-57/94 *Commission* v *Italy* [1995] ECR I-1249, paragraph 23.

4 — Case C-107/92 *Commission* v *Italy* [1993] ECR I-4655, paragraph 12.

exemption from the obligation to publish notice of a call for tenders, is available only if three conditions are fulfilled concurrently. That derogation requires the existence of an unforeseeable event, extreme urgency rendering the observance of time-limits laid down by other procedures impossible and, finally, a causal link between the unforeseeable event and the extreme urgency resulting therefrom.'

17. The German Government contends that there were '*reasons of extreme urgency*' for completing the project before 18 February 1992 in so far as the *Zenith*, the vessel built by the Meyer-Werft shipyard, was to be handed over on that date. Failure to comply with that time-limit would have had the result that the vessel could not have been delivered on time and that consequently the Meyer-Werft shipyard, the largest employer in the area, with some 1 800 employees, would have forfeited its reputation and been required to pay a contractual penalty. Moreover, concern not simply for the Meyer-Werft shipyard but also for the structurally weak region made it imperative to complete the project before 18 February 1992, in so far as the long-term consequence of any failure by the Meyer-Werft shipyard to meet its contractual obligations might well have been that the shipyard would incur a bad reputation with regard to reliability and productivity. This would have led to a loss of orders and consequent loss of jobs. At worst, the shipyard would have had to close, resulting in the loss for the region of its major employer.

Against this, the Commission argues that the grounds relied on by the German Government are not sufficient to be covered by the term 'reasons of extreme urgency' in Article 5(3)(c). So far as the possible consequences for the region are concerned, the Commission submits in particular that there does not appear to be any evidence that such consequences would have materialized.

18. I must first stress that failure to complete the project for deepening part of the lower Ems by 18 February 1992 would have had the consequence that the Meyer-Werft shipyard would have been unable to meet its contractual obligations. If a Member State could deviate from tendering procedures every time an undertaking might be unable to meet its contractual obligations as a result of delay in completing public works, the scope of Article 5(3)(c) would be extremely wide. This would not be in keeping with the fact that the provision is an exception which can be applied only in so far as is strictly necessary. The desire on the part of a Member State to assist an undertaking to meet its commitments cannot therefore, in my view, be treated as constituting in itself 'reasons of extreme urgency' for departing from the tendering procedures laid down.

19. If, however, one proceeds on the basis that the consequences of a failure to complete the project by 18 February 1992 would have been as the German Government has

submitted, that failure to comply with the time-limit would have had particularly serious consequences. The region in which the Meyer-Werft shipyard is situated is, according to the information submitted by the German Government, structurally weak and the Meyer-Werft shipyard, with 1 800 employees, is the largest regional employer. Further, according to the available information, some 1 700 jobs in a range of suppliers also depend on the shipyard's existence. I can fully understand why a Government should be doing all in its power to save jobs, and it is also evident that the preservation of the shipbuilding industry is a matter of importance in Germany, as in other Member States.

That notwithstanding, the German Government has not, in my view, produced any detailed information to demonstrate that a delay in completing the project and the consequent failure on the part of the Meyer-Werft shipyard to honour the contract into which it had entered would *per se* have led to closure of the shipyard and the resultant serious consequences. For that reason, the German Government cannot, in my view, be deemed to have discharged the burden of proof that those 'reasons of extreme urgency' did in fact exist in the present case.

20. Furthermore, the German Government has not argued in the course of the proceedings that the works project was necessary in order to prevent the waste of assets which would have resulted if it had not been possible to hand over the completed vessel and it had consequently been necessary to scrap it. It is therefore unnecessary to consider in any greater detail to what extent this view might, in this case, have led to 'reasons of extreme urgency' within the meaning of Article 5(3)(c) of the directive.

21. According to the view taken by the German Government, the condition that the reasons of extreme urgency, which in that Government's view made it impossible to respect the time-limits laid down in the directive with regard to the tendering procedures, should be '*brought about by events unforeseen by the contracting authorities in question*' was also satisfied in this case. The Wasser-und Schiffahrtsamt Emden could not, in the estimation of the German Government, foresee that the Bezirksregierung für Weser-Ems would refuse to give its approval for the project since it had not expressed any objections during the discussions on the project. In the German Government's view, the refusal by the Bezirksregierung für Weser-Ems to give its approval also *cannot be regarded as a circumstance attributable to the contracting authority* inasmuch as the Bezirksregierung für Weser-Ems is a State authority over which the Wasser-und Schiffahrtsamt Emden, itself a Federal authority, cannot exercise any influence.

Against this, the Commission has contended that the refusal by the Bezirksregierung für Weser-Ems to give final approval for the plans to deepen the lower Ems cannot be regarded as an occurrence which the contracting authorities could not have foreseen in so far as the Wasser-und Schiffahrtsamt Emden ought to have taken into consideration the possibility that such a change in policy might occur. The Commission has added that the reasons of extreme urgency were brought about by the German authorities' own conduct and that the circumstances were therefore attributable to the contracting authority.

22. I would point out in this regard that account must be taken of a range of different factors when planning and carrying out large public works projects. In this connection, an approval procedure is often laid down in Member States for such plans. The purpose of such procedures is to ensure that the authorities are made aware of any relevant public and private interests and that their respective merits can be considered. Objections of all kinds can be made during the approval procedure. It is possible that the approval procedure may be conducted without any problems. However, it is also possible that this will not be the case. A contracting authority cannot therefore presume in advance that the approval procedure will have a particular outcome.

23. Very special importance attaches nowadays to the environmental aspects of construction work. It is for that reason extremely likely in any large public works project that environmental objections will surface against a project during the approval procedure. This will in many cases necessitate in-depth discussions and investigations and will perhaps make it necessary to amend the project or quite simply abandon it.

At the Community level also, a high degree of priority has been attached to the environment, with, for example, the implementation of the EIA Directive, [5] which provides that in the case of specified works and other projects which are likely to have a significant effect on the environment, an environmental impact assessment must be carried out before permission for implementation can be granted.

An approval procedure will very often involve elected bodies which, after examining all aspects of the project, are required to decide whether the project should be approved. In view of the fact that changes in views and majorities form part and parcel of political reality, a contracting authority can be certain that it will be able to carry through a planned project only once the approval procedure has been completed in its entirety and the political bodies have indicated their definitive and binding agreement to the project in question.

24. In the present case, the Wasser-und Schiffahrtsamt Emden knew from the date on which the decision to deepen the lower Ems was taken that a procedure for approval of the project plans would have to be carried out. The Wasser-und Schiffahrtsamt Emden must therefore have been aware for the whole time that objections against the project, on, for instance, environmental grounds, might be forthcoming and that there was consequently a risk that the Bezirksregierung für Weser-Ems might

5 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

ultimately refuse to give its consent to the plans for deepening the lower Ems. The fact that the Bezirksregierung für Weser-Ems did not express any objections during a preliminary discussion of the project could not therefore, in my opinion, have provided the Wasser-und Schiffahrtsamt Emden with any grounds for discounting the possibility that, on the basis of the subsequent procedure concerning the approval of the project, the Bezirksregierung für Weser-Ems might refuse to accord its definitive and legally binding consent.

25. The refusal by the Bezirksregierung für Weser-Ems to accord its definitive consent to the plans for dredging the lower Ems cannot therefore be regarded as an '[event] unforeseen by the contracting authorities'.

26. According to the second sentence in Article 5(3)(c), the circumstances invoked to justify extreme urgency also 'must not in any event be attributable [to] the contracting authorities'. The purpose of that requirement must be to confine application of the derogating provision to those cases in which the events invoked to justify the extreme urgency are attributable to external factors, that is to say, factors which lie beyond the scope of influence of a Member State's administrative authorities.

It follows from what was discussed at point 24 above that the need to apply the procedure in Article 5(3)(c) which has been relied on arose because the contracting authority failed to make allowance for the possibility that the Bezirksregierung für Weser-Ems would refuse to give the necessary consent, thereby rendering it necessary to implement a project for the temporary deepening of part of the lower Ems. It can for that reason be said that the contracting authority's own conduct was the real reason why the ordinary tender procedures could not be applied.

Furthermore, it is not possible, in my view, to draw a clear distinction in a Member State between the authority which, in the particular case, is the contracting authority and other authorities in that Member State. Whether or not it is federal in structure, a Member State must be identifiable with all the authorities in that State. In my view, therefore, a Member State must assume responsibility for all actions of the various authorities within that State. It must not be possible for one authority to excuse itself on the ground that it does not know what another authority is doing or is about to do.

The condition in the second sentence of Article 5(3)(c) to the effect that the circumstances invoked to justify extreme urgency 'must not in any event be attributable [to] the contracting authorities' can also therefore, in my opinion, not be regarded as having been satisfied.

27. The final condition governing application of the derogating provision, namely that for reasons of extreme urgency '*the time-limit laid down for the open, restricted or negotiated procedures referred to in paragraph 2 above cannot be kept*', was, in the German Government's view, satisfied inasmuch as a tendering procedure could not be initiated before the decision to approve the project became operative, that is to say, on 15 August 1991. That date corresponded with the date on which the contract was awarded. In the alternative, the German Government submits that it was not possible to comply with the time-limits in Article 15(1) concerning cases of urgency, since experience shows that, in addition to the 15 +10 days laid down in Article 15, making a total of 25 days, it would have been necessary to have 14 days to process the applications to participate which had been received, 5 days to view the place of work and 28 days to process the tenders received, making a total of 72 days, in order to implement the procedure.

28. Against this, the Commission argues that it would in all circumstances have been possible for the contracting authority to comply with the time-limits in cases of urgency laid down in Article 15(1), since the Wasser-und Schiffahrtsamt Emden had, between 21 June 1991, the date on which the six German undertakings were invited to submit tenders, and 15 August 1991, the date on which the contract was awarded, 55 days in which to implement the required procedure.

29. I agree with the Commission that the Wasser-und Schiffahrtsamt Emden could have instituted a tendering procedure on 21 June 1991. On that date, the Wasser-und Schiffahrtsamt Emden did also in fact institute the contested tender after negotiated procedure without publication of a tender notice. If the Federal Republic of Germany was already able on that date to set in motion that procedure without awaiting the entry into force of the decision approving the project for the temporary deepening of part of the lower Ems, there could not have been anything to prevent it from applying a procedure with a tender notice making implementation of the project conditional on the approval becoming effective.

30. On 21 June 1991, 55 days were available for the implementation of a tendering procedure. This number of days would appear to be adequate for the purpose of implementing the procedure in cases of urgency in Article 15(1), since, in addition to the 15 +10 days mentioned therein, making a total of 25 days, a further 30 days were available for, *inter alia*, processing the applications to participate and tenders which had been received.

The length of time which the German Government claims would have been necessary in addition to the 25 days required under Article 15(1) appears at the outset to be more than necessary. In support of its calculation, the German Government has simply submitted that it is based on long experience regarding the length of time required for awarding public works contracts.

However, the burden of proving that it was not possible to implement the procedure for cases of urgency in Article 15(1) is one that rests on the German Government, and I find, on the basis of the material submitted, that it has not been established with sufficient probability that it was not possible to implement a procedure with a tender notice within the 55 days available between 21 June 1991 and the signing of the contract on 15 August 1991, the date on which the approval decision entered into force.

31. To sum up, it must be concluded that none of the conditions set out in Article 5(3)(c) of the directive for allowing the award of a contract by negotiated procedure without prior publication of a tendering notice can be regarded as having been satisfied.

I accordingly take the view that the form of order sought by the Commission should be granted and that consequently, by reason of the fact that the Wasser-und Schiffahrtsamt Emden awarded a public works contract for the dredging of part of the lower Ems from Papenburg to Oldersum by negotiated procedure without publishing a tender notice in the *Official Journal of the European Communities*, the Federal Republic of Germany has failed to fulfil its obligations under the directive.

Costs

32. The Commission has asked for costs to be awarded against the Federal Republic of Germany. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

Conclusion

33. In view of the foregoing, I propose that the Court should rule as follows:

(1) By reason of the fact that the Wasser-und Schiffahrtsamt Emden awarded a public works contract for the dredging of part of the lower Ems from Papenburg to Oldersum by negotiated procedure without publishing a tender notice in the *Official Journal of the European Communities*, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, as amended by Council Directive 89/440/EEC of 18 July 1989.

(2) The Federal Republic of Germany is ordered to pay the costs of the proceedings.